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In the Supreme Court of the United States

October Term, 1978
No. 78-1719

DR. JOSEPH T. SKEHAN,
Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, former Superintendent of Education of the Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit at Nos. 77-2311 and 77-2312

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Counter-Statement of the Case	1
Argument	8
Conclusion	12

TABLE OF CITATIONS

CASES:

Board of Trustees of Bloomsburg State College, 429 U.S. 979 (1976)	6
Brungard v. Hartman, 12 Pa. Commonwealth Ct. 477, 315 A.2d 913 (1974), rev'd on other grounds, —— Pa. ——, 394 A.2d 1265 (1978)	10, 11
Carey v. Piphus, 435 U.S. 247 (1978)	5
Edelman v. Jordan, 415 U.S. 651 (1974)	9, 11
Finklestein v. Shippensburg State College, 29 Pa. Commonwealth Ct. 373, 370 A.2d 1259 (1977)	10
Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976)	11
Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946)	9
Mayle v. Pennsylvania Department of Highways, 479 Pa. 384, 388 A.2d 709 (1978)	9, 10

Poklemba v. Shamokin State General Hospital, 21 Pa. Commonwealth Ct. 301, 344 A.2d 732 (1975), rev'd on other grounds, 479 Pa. 414, 388 A.2d 722 (1978) 10

Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855 (1978) 11

Quern v. Jordan, —— U.S. ——, 99 S.Ct. 1139 (1979) 9

Skehan v. Board of Trustees of Bloomsburg State College, 353 F. Supp. 430 (M.D. Pa. 1973) 4

Skehan v. Board of Trustees of Bloomsburg State College, 353 F. Supp. 542 (M.D. Pa. 1973) 4

Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974) 5

Skehan v. Board of Trustees of Bloomsburg State College, 421 U.S. 983 (1975) 5

Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53 (3d Cir. 1976) 5

Skehan v. Board of Trustees of Bloomsburg State College, 431 F. Supp. 1379 (M.D. Pa. 1977) 6

Skehan v. Board of Trustees of Bloomsburg State College, 436 F. Supp. 657 (M.D. Pa. 1977) 6

Skehan v. Board of Trustees of Bloomsburg State College, 590 F.2d 470 (3d Cir. 1978) 7

Specter v. Commonwealth, 462 Pa. 474, 341 A.2d 481 (1975) 11

Williams v. West Chester State College, 29 Pa. Commonwealth Ct. 240, 370 A.2d 744 (1977) 10

Wood v. Strickland, 408 U.S. 564 (1972) 8

Wood v. Strickland, 420 U.S. 308 (1975) 11

STATUTES:

Civil Rights Act of 1871, 42 U.S.C. §1983 ..... 8, 9

Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988 7

CONSTITUTIONS:

United States Constitution

First Amendment 4, 8, 11

Eleventh Amendment 5, 6, 7, 9, 10, 11

Fourteenth Amendment 4, 6

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, Respondents submit this brief in opposition to Petitioner Skehan's Petition for a Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

Petitioner, Dr. Skehan, was appointed as a non-tenured Associate Professor of Economics at Bloomsburg State College in January, 1969. His contract was renewed for the 1969-70 academic year, but on February 27, 1970, the College's Board of Trustees, on the recommendation of defendant Nossen, decided that Skehan should be notified that the 1970-71 academic year would be the terminal year of his appointment. Skehan was notified of the Board's action through a letter from President Nossen, dated May 19, 1970.

On September 21, 1970, Skehan wrote Nossen a letter invoking Article 5e of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College (hereinafter Article 5e). In that letter, he alleged that the decision not to reappoint him after 1970-71 had been caused by considerations violative of his academic freedom.[1] Nossen did not refer

[1] The Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College went into effect on September 1, 1968. It has since been superseded by a collective bargaining agreement, but was in effect during the entire period of Skehan's dispute with the College. Article 5e provided:

> If a faculty member's service to the College is to be terminated during the first two years of the probationary (pretenure) period, the President of the College will feel free to explain to the faculty member the basis of the decision, but he shall not be required to do so except in a situation where there is an allegation of infringement of academic freedom. If a faculty member of professorial rank, on probationary appointment, alleges that a decision not to reappoint him has been caused by considerations violative of academic freedom, his allegation shall be given preliminary consideration by the Committee on Professional Affairs, and the procedures concerning notification, appeal, hearing, and defense outlined in No. 9 of this document will be followed.

Article 9 of the Statement, referred to in Article 5e, set out the formal procedures applicable to the dismissal of a tenured faculty member.

Skehan's letter to the Committee on Professional Affairs, the College body charged with initiating proceedings under Article 5e to resolve such allegations, nor did Skehan take any further action to secure an Article 5e hearing.

Contemporaneous with his invocation of Article 5e, Dr. Skehan became embroiled in a dispute between the economics department and the College's administration concerning the scheduling of classes. During that dispute, Skehan was warned that his failure to teach his classes as scheduled by the College would result in the taking of immediate and direct administrative action against him. On or about October 1, 1970, Dr. Skehan was observed teaching a course not assigned to him, and on October 9, Dr. Nossen notified Skehan that he was relieved of all classroom responsibilities pending a final hearing. Nossen's letter of October 9 also demanded of Skehan a "full and complete accountability" of his actions on campus since the start of the semester. When Skehan failed to comply with this demand, Dr. Nossen informed him that, effective October 17, 1970, he was removed from the College's payroll, subject to final approval by the Board of Trustees. That approval was obtained at the Board's regularly scheduled meeting of October 23, 1970.

Skehan filed a complaint in district court on October 10, 1972. He alleged that his suspension and ultimate dismissal in the fall of 1970 were in retaliation for his active role in campus political issues, and hence were violative of his rights under the First Amendment. He also alleged that the defendants suspended and dismissed him without complying with the applicable College laws and regulations governing faculty status, thereby depriving him of that due process of law guaranteed by the Fourteenth Amendment. He requested preliminary and permanent injunctive relief in the nature of reinstatement and an award of attorney's fees.

The district court held a hearing on Skehan's request for a preliminary injunction on January 11 and 12, 1973. Preliminary injunctive relief was denied in an opinion and order dated January 31, 1973. *Skehan v. Board of Trustees of Bloomsburg State College,* 353 F. Supp. 542 (M.D. Pa. 1973). Subsequently, the parties stipulated that a final hearing could be held on the record developed at the preliminary injunction hearing, and the district court issued its opinion on the merits of May 9, 1973. *Skehan v. Board of Trustees of Bloomsburg State College,* 353 F. Supp. 430 (M.D. Pa. 1973) (207a).

In that opinion, the district court held that Skehan's dismissal from the faculty had been a result of his actions during the scheduling dispute. Thus, his dismissal was found not to have been violative of the First Amendment. However, the district court did find that Skehan's dismissal during the term of his contract entitled him, under the Due Process Clause, to a prior hearing on the grounds of his dismissal, and that such a hearing had not been afforded Skehan by the College.

The District Court went on to find that had Skehan been afforded a hearing prior to his discharge, in all probability the outcome would have been the same. Accordingly, the district court found no proof of actual damages and awarded Skehan only nominal damages (216a).[2]

On appeal, the Court of Appeals for the Third Circuit affirmed both constitutional findings with respect to Skehan's dismissal, but remanded for reconsideration of the appropriate remedy. That court also remanded for findings of fact on the constitutionality of the decision not to renew Skehan's contract beyond 1970-71, as well as consideration of Eleventh Amendment questions and the propriety of attorney's fees. *Skehan v. Board of Trustees of Bloomsburg State College,* 501 F.2d 31 (3d Cir. 1974) (178a).

Subsequently, this Court granted Skehan's petition for writ of certiorari, vacated the judgment of the Court of Appeals and remanded the case "for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society,* [421 U.S. 240 (1975)], and *Wood v. Strickland,* 420 U.S. 308 (1975)." 421 U.S. 983 (1975). On remand, the Court of Appeals reviewed the case en banc and held, *inter alia,* that the College was an agency of the Commonwealth, and, therefore, immune from suit under the Eleventh Amendment. That court also remanded the question of the official immunity of individual defendants to the district court for findings of fact concerning the good faith of those defendants. *Skehan v. Board of Trustees of Bloomsburg State College,* 538 F.2d 53 (3d Cir. 1976) (154a).

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[2] See *Carey v. Piphus,* 435 U.S. 247 (1978).

On November 29, 1976, this Court denied defendants' petition for a writ of certiorari. 429 U.S. 979 (1976). Plaintiff (petitioner herein) sought no review of the Court of Appeals' order of remand to the district court.

On remand, the district court took further evidence on the questions of whether Skehan had a property interest in renewal in a non-tenured position and whether defendant Nossen acted in good faith with respect to Skehan's nonrenewal and subsequent termination. By order and opinion dated May 18, 1977 (101a), the district court found that plaintiff had a contractual right to certain pre-non-renewal procedures which was protected by the Fourteenth Amendment. It also found that defendant Nossen had acted in good faith at all relevant times. *Skehan v. Board of Trustees of Bloomsburg State College,* 431 F. Supp. 1379 (M.D. Pa. 1977).

On July 20, 1977, after holding a separate hearing on remedy, the district court denied Skehan's request for full reinstatement and ordered the College to place him on a suspended with pay status pending the outcome of a non-renewal and a pre-termination hearing to be held in accordance with the "contract" in effect at the time of Skehan's termination. Attorney's fees were also denied, in part on the basis of the Eleventh Amendment and, in part, on the basis of equitable considerations. *Skehan v. Board of Trustees of Bloomsburg State College,* 436 F. Supp. 657 (M.D. Pa. 1977) (78a).

While the College initiated the non-renewal and termination procedures, Skehan appealed the decision of the district court. During the pendency of that appeal, those

procedures were completed and Skehan's employment was terminated by the College.[3]

On appeal, the Court of Appeals affirmed the judgment and holdings of the district court in nearly all respects, remanding only for consideration of an award of attorney's fees to Skehan against defendants in their official capacities, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. *Skehan v. Board of Trustees of Bloomsburg State College,* 590 F.2d 470 (3d Cir. 1978) (1a). The Court of Appeals refused to consider Skehan's complaints concerning the College's compliance with the lower court's order of July 20, 1977 requiring reinstatement if the appropriate pre-termination hearing was not held in a timely fashion. Instead, the Court of Appeals directed that that issue first be raised in the district court.[4]

On February 14, 1979, the Court of Appeals denied Dr. Skehan's petition for rehearing (55a). Subsequently, the Court of Appeals twice stayed issuance of its mandate, the second time until May 15, 1979. (53a-54a). Skehan filed his petition for writ of certiorari with this Court on May 15, 1979.

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[3] In this regard, a pre-termination hearing was held in early 1978 before a board consisting of nine faculty members. On April 7, 1978, after a full evidentiary hearing, that board recommended that Dr. Skehan's contract be terminated. That recommendation was approved by the Board of Trustees of the College and, on June 2, 1978, Skehan was removed from the College's payroll.

[4] Thus, Skehan's reference to the post-trial termination proceedings is not only inaccurate, but, more importantly, improper.

ARGUMENT

Petitioner requests this Court to grant certiorari to determine nine separate questions which he argues were improperly decided by the Third Circuit Court of Appeals. Properly framed, however, petitioner's questions can be put in four separate categories:

1. Did the lower courts properly determine that the Commonwealth of Pennsylvania is immune under the Eleventh Amendment from a claim for damages in federal court under 42 U.S.C. §1983;

2. Did the lower courts properly decide that Bloomsburg State College and its Board of Trustees are agencies of the Commonwealth and, therefore, share its sovereign immunity from suit in federal court;

3. Did the lower courts properly apply the standards set forth by this Court in *Wood v. Strickland*, 408 U.S. 564 (1972), in determining the immunity of a defendant college official; and

4. Did the trial court err in deciding that the non-renewal and termination of petitioner's employment were not violative of his First Amendment rights prior to the completion of court ordered administrative due process procedures related to that non-renewal and termination.

For the following reasons, this Court should not grant certiorari on any of the issues which petitioner seeks to raise.

1. The lower court properly reached[5] and decided the issue of whether the Commonwealth has immunity, under the Eleventh Amendment, from claims for damages under 42 U.S.C. §1983. In this regard, this Court recently recognized that Section 1983 does not authorize actions otherwise barred by the Eleventh Amendment. *Quern v. Jordan*, —— U.S. ——, 99 S.Ct. 1139 (1979).

This Court has also held that a state will be held to have waived its constitutional protection under the Eleventh Amendment only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."[6]

In *Mayle v. Pennsylvania Department of Highways*, 479 Pa. 384, 388 A.2d 709 (1978), the Pennsylvania Supreme Court held that the state constitution did not provide the Commonwealth with a self-executing immunity from liability in state courts, but rather that such

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[5] Petitioner suggests that the defense of sovereign immunity was waived by respondents' alleged failure to raise it in the lower court. This contention is clearly without merit. *Edelman v. Jordan*, 415 U.S. 651 (1974).

Petitioner also suggests that he was improperly denied the right to amend his complaint and introduce new evidence concerning the issue of sovereign immunity. Never, however, did petitioner assert that right in the lower courts as he sought to amend his complaint only to add additional defendants (153a) and asked leave to present additional testimony only with respect to the reasons for the non-renewal of his teaching contract (150a). This issue is, therefore, not properly before this Court.

[6] Certainly, no such waiver can be found from the Commonwealth's historical submission to mandamus actions in *state courts*. See *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573, 577 (1946).

immunity could be *established* only by action of the state legislature. In so holding, the Pennsylvania court did not, nor could it have, affected this Court's holdings that the protection of the Eleventh Amendment is self-executing and can be *waived* only by express legislative action. Nor did the state court consider whether such action had been taken. Subsequently, in legislation *limiting* the Commonwealth's liability in state courts, the state legislature made clear that none of its actions were intended to effect a waiver of Eleventh Amendment immunity.

2. The Court of Appeals properly held that Bloomsburg State College and its Board of Trustees are agencies of the Commonwealth and, therefore, share its Eleventh Amendment immunity from suit in federal court. In so doing, the Court of Appeals properly considered state court cases which examined the statutory relationship of identical entities to the Commonwealth and concluded that any judgment against those entities would necessarily be paid by the Commonwealth. See *Williams v. West Chester State College*, 29 Pa. Commonwealth Ct. 240, 370 A.2d 744 (1977); *Finklestein v. Shippensburg State College*, 29 Pa. Commonwealth Ct. 373, 370 A.2d 1259 (1977); *Brungard v. Hartman*, 12 Pa. Commonwealth Ct. 477, 315 A.2d 913 (1974)[7], *rev'd on other grounds*,

[7] Until the decision in *Mayle v. Pennsylvania Department of Highways, supra*, the courts of Pennsylvania had recognized a state constitutional immunity of the Commonwealth and its agencies from suit in state court. While the analysis applied to determine whether a given entity was an agency of the Commonwealth could become extremely complex, the primary factor was the fiscal relationship of the entity to the Commonwealth. *Poklemba v. Shamokin State General Hospital*, 21 Pa. Commonwealth Ct. 301, 344 A.2d 732 (1975), *rev'd on other grounds*, 479 Pa. 414, 388 A.2d 722 (1978). See also *Specter v. Commonwealth*, 462 Pa. 474, 341 A.2d 481 (1975).

—— Pa. ——, 394 A.2d 1265 (1978). It is just such judgments which are barred by the Eleventh Amendment. *Edelman v. Jordan, supra.*

3. The lower courts properly determined that the defendant school official acted in good faith and was, therefore, immune from liability in this lawsuit. In doing so, the lower courts correctly applied the standards established by this Court in *Wood v. Strickland*, 420 U.S. 308 (1975) and reaffirmed in *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855 (1978). Certainly, no case had clearly established either the constitutional or contract rights asserted by petitioner prior to the date the defendant school official took the actions at issue in this lawsuit. *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. den.*, 425 U.S. 963 (1976). See *Procunier v. Navarette, supra.*

4. The lower courts acted properly in deciding that petitioner's non-renewal and termination violated no First Amendment rights of petitioner. First, petitioner never requested that either lower court forego deciding this issue until completion of administrative proceedings. Moreover, nothing in the administrative proceedings provided by petitioner's employment contract provided for a decision, in those proceedings, of First Amendment issues. Thus, this issue is not properly before this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitioner has presented no issues worthy of discretionary review by this Court and that, therefore, his Petition should be denied.

Respectfully submitted,

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